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ABSTRACT

Any community, regardless of size, generates its own individual system of law, and only when such a system of law is in fact substantially just and substantially effective is the community able to function. Until recently, the legal systems within institutions of higher education have missed this point because for generations the traditional power holders in the academic community have gone largely unchallenged. As a result, systems of law active in academic communities or subcommunities are in accordance with the most traditional and strict ideas of fair play. This document analyzes the nature of communities generally in order to determine both the extent to which university environments reflect these characteristics and the ways in which they may be useful in identifying and responding to the problems of the modern university. The process of analysis begins with the idea of the communitization process in academia, where the end product is both academic and a community, a small society and a small political order. Every such community must, either explicitly or otherwise, define for itself its own special nature and purposes and its own relationship to the general academic tradition of which it is a part. (Author/HS)

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UBI SOCIETAS IBI JUS - THE ROLE OF A SYSTEM OF LAW IN THE COMMUNITIZATION PROCESS IN ACADEME

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In Aristotle's Politics the key phrase "ubi societas ibi jus" suggests that any community, regardless of size, generates its own individual system of law. This concept, as Professor Winston Fisk (1970) has observed, suggests "that only when such a system of law is in fact substantially just and substantially effective is the community able to function". Until recently we tended to miss that point because for generations the traditional power holders in the academic community have gone largely unchallenged. As a result we have found that systems of law active in academic communities or subcommunities must chime with the most demanding forms of traditional ideas of fair play so that the power holders can believe that by their own standards of values they are doing justice; they cannot feel illegitimate if they are to survive. If the leading members of the academic community do not have faith in the rightness and fairness of their legal system, they will lose confidence in it, particularly today, when the academic environment and its constituent subcommunities can be, and often are, as torn by class and interest group conflict as any other part of the American society, and its "jus" therefore has before it a very difficult task.

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The university community and its subcommunities have a historical beginning founded on the basic elements of the communitization process. Through the years these educational environments have evolved into a system based upon a hierarchical authority structure. The emphasis that has been placed upon authority as one of the essential elements of a community has reinforced this evolutionary change. But now as we consider the possibility of reemphasizing the importance of the communitization process, we should also be cognizant of the necessary changes that must be made in the area of authority.

The conception of the university environment as a group of subcommunities presents a number of advantages over traditional models. As the study of community organization has become progressively sophisticated, vital generalizations about the structure, genesis and function of communities have become increasingly possible. In much the same way, the conquest of polio awaited the identification of the virus responsible for the disease (in order that our knowledge of the nature of viruses generally, and the laws which they obey, could be brought to bear upon the problem of controlling this one). Accordingly, the importance of a number of aspects of community life either neglected or incorrectly evaluated by alternative views of the university have become evident. The resulting light cast upon the complex of interrelationships between individuals, their common and separate needs and the social structures which

exist to serve them has illuminated these interrelationships in a manner which should allow us to more accurately identify and more appropriately respond to the problems which they present. Such insights are directly traceable to the recent tendency to return to the community model in explaining the structure and function of the university.

Let us attempt, then, to analyze the nature of communities generally and determine both the extent to which university environments reflect these characteristics and the ways in which they may be useful in identifying and responding to the problems of the modern university. The process of analysis should begin with the idea of the communitization process in academia, where the end product is both academic and a community, a small society and a small political order. Every such community must, either explicitly or otherwise, define for itself its own special nature and purposes, and its own relationship to the general academic tradition of which it is a part.

An important concept in this analysis that must be understood is that the support of the legal system in a community rests on the consent of those governed or affected by the communitization process. Whether or not one cares to accept all the consequences of Hobbes' theory of social contract, one cannot deny that, in some sense, the state of nature he describes once existed. One will not find law and legal systems creating a community. The law and legal systems develop as communities develop out of interaction between the individuals who make up the community.

Not only must the community, if it is to be successful, develop a legal system which enhances these interactions, but it must also satisfy the triad of needs identified by Robert Ardrey (1970). These needs and the conditions which engender them include (1) identity - anonymity, (2) stimulation - boredom, and (3) security - anxiety.

In addition to these functions of communities generally, any academic community has some indispensable interests which are particular to it. These may vary in detail from campus to campus, from subculture to subculture, and from interest group to interest group, but there is a stable core arising from the nature of the enterprise itself. The problem of defining jurisdiction and authority with reference to the normative order is probably the paramount area in need of complete delineation. One will find that the overall collective structure cannot be divorced from political organization, oriented to maintaining commitments to this order and to the jurisdictional functions associated with it, in relationship both to its own population and to other societies. This means that the boundaries of a community tend to coincide with the territorial jurisdiction of the highest order units of political organization. The problem of jurisdiction is truly one of obligation. Why should one particular individual be obligated to this community and its system of law?

If the community claims, as it must, to be a self-governing organization, then it must assert some principle of obligation. There must exist, in other words, some authority by which the community may command obedience to its laws and the norms they support. Of course, the principle of authority chosen will affect all that follows from it. Some communities will find individuals who deny any obligation to the existing regime or system of law. The principle will hardly persuade these deviant individuals, but it must persuade the rest of the community if it is to become a basis for action. Emile Durkheim (1933) warned that we must not say that our actions shock the common sense of the community because they are unacceptable, but rather that they are unacceptable because they shock the common sense of the community.

The support of a set of laws or regulations and the legal structure that they depend upon rests on their acceptance not only by majorities but also minorities within the community. Chester I. Barnard (1938) clarified this problem by stating that "authority lies always within him to whom it applies. Coercion in any form creates a contrary illusion; but the use of any force ipso facto destroys the authority postulated. In this circumstance it creates a new authority, a new situation, a new objective which is granted when the force is accepted."

The concept of authority which seems to flow from the unique nature of the university community is that distinguished by Robert Nisbet (1971). He writes not of the authority utilizing

power and force, but of some manifestation of consensus which may be unwritten, unprescriptive, and drawn from the common experience and goals of the membership.

Once one is committed to an analysis of the communitization process, the problem of authority, ultimate power in the community, and the source from which it is derived becomes paramount. Every community encounters this problem of selection and those that become formal usually have a constitutional order that faces it explicitly. For those actively involved in higher education today the typical and more or less automatic selection system is usually democracy, or some form of majority rule. But when analyzing the communitization process one should not unthinkingly suppose there are no other choices. There may well be cases in our subcommunities in which an aristocratic principle of rule, based perhaps on merit, knowledge, or even social position can be utilized effectively.

I would submit that the beginning of the answer to this question is found in the well-defined area of ultimate authority, reasonably exercised and supported by the majority of the membership. In a strict legal sense the argument is crystal clear for the major academic community: the trustees are responsible for the proper employment of all the resources of the institution, for carrying out of its numerous trusts and gifts upon condition and for the good order of the whole enterprise under its charter and the

applicable law. In the subcommunities based upon individual needs and goals and not on a charter or law, it is much more difficult to deal with the question of ultimate authority. Usually in these circumstances a coalition representing the majority of the membership acts through a framework, neither arbitrarily nor very often directly. But when the community's goals or the individual's needs are in danger, the subcommunity very often will establish a structure of ultimate authority that closely resembles the main community of which they are a part.

The judicial decisions in the subcommunity are usually delegated to the coalition or a tribunal of the coalition which by no means is a cure-all for the social ills of the community. The drives for change within a community or subcommunity are neither created nor satisfied by what is done with the administration of justice within the community, but evidence is not lacking that it has some effect on them.

It is the fact that the community is based upon authority that creates the laws and the legal structure. George C. Homans (1950) made the point in The Human Group that whenever a number of individuals get together in a group something new emerges, the nature of which depends not just on the individuals, but also on their mutual concerns and mutual relationships. Homans went on to indicate, "Every time that elements are joined together and release a new phenomenon, it is necessary to think of this phenomenon as situated not only in the elements but in the whole form by their union."

The legal phenomenon that results from the establishment of a community based on authority is therefore created by the community and in a real sense is part of the communitization process.

Durkheim (1933) and Homans (1950) express the thesis that a system of law is a condition which is essential to social life. That this condition is an essential one is more the result of the fact that law appears to the members of the community to be essential to its existence than the fact that without it the communitization process would fail. In the final analysis we find that the laws or regulations are those norms which the community finds necessary and for the violation of which it is willing to apply sanctions. The best explanation of this point is found in The Human Group. Homans (1950) writes, "Let us consider especially the action of the offense on the members of the group as a whole. So far as the group knows about the offense--and for us offenses that remain secret need not be treated as offenses at all--the departure from the norms of the group will arouse sentiments in the group, the stronger and more important the norms violated, and, as is usually the case with sentiments, they will seek more expression in activity."

The activity in question is the punishment of the actions. When, moreover, the punishment is of a special kind, linked with the breach of a specific norm, the punishment with its release of sentiment, will tend to reawake in the minds of the group members

the importance of the norm. Thus a breach of a norm sets in motion controls that tend, when the group is in equilibrium, not only to bring the offender back toward conformity with the norm, but also to keep the norm alive in the minds of the other members of the group. The offender is chastised and the norm vindicated. So far as norms are an element in maintaining the social equilibrium, and I believe that they are, social control in this further way tends to pull the group back to the point from which the offense moved it. Much legal behavior is ritual in the sense that, although it may not have much effect on the law breaker, it continually reaffirms the law. The majesty of the law is a religious majesty, and our courts tend to become churches.

The end result of the active legal system then is twofold. First to punish the violator and return the offender to the appropriate modes of behavior and second to remind the community of the standards that it has set. Therefore, one may believe that if indeed there were no deviant behavior it would be necessary for the community to invent it, at least on minimal levels, since the punishment of deviant behavior serves to reinforce the order of the community. However, as Cuzzort (1969) writes, "The considerations of deviant behavior are actually a means of entering into a greater manner--an examination of the changing nucleus of social order." Repressive punishment occurs when the solidarity of a community comes from its collective commitment to a moral order of some kind. By sharing similar

beliefs, traditions, and moral sentiments individuals are kept together. But this form of social integration is in the process of being supplanted by another. The key to this is the fact that repressive punishment has been steadily declining in severity. Taking its place is punishment more concerned with the attainment of restitution than with making an example.

This trend away from repressive punishment is followed by an equally strong trend to desert the legal system within the academic community. In recent years this desertion has led to the invocation of external civil law, police intervention and various kinds of ad hoc contrivances, most of which are political in nature and aimed at some kind of politically negotiated settlement of campus disorders. One reason for the desertion is, of course, the unparalleled severity of the challenges to and attacks upon the structure of campus order in the 1960's. A second and even more alarming reason for the desertion has been a lack of confidence in the campus system of law. This is partly due to a failure of nerve; campus authorities have on occasion lost the will to enforce or revise their system of law, and have unnecessarily given up on it. But basically the lack of confidence has a deeper root, namely the defects in the system itself. The most serious defects are not accidental nor are they superficial but are the fundamentals of the system, which designed in an earlier and perhaps more peaceful time, have not been brought up to date to meet the changes in the academic environment.

The time has come for a thorough analysis of the legal systems we have in the academic communities as well as the legal fertilization of new systems and new communities. Each subunit of the campus is beginning to find its own institutionalized values which can be conceived as specifications with appropriate levels of reinforcement. To cope with their own internal differentiation of function each subunit will be establishing somewhat different norms, which should be regarded as specifications both of the subcollectivity's values and of the more general norms applicable both to it and to other types of subcollectivities.

The community, then, may be viewed as a political organization, functionally organized about the attainment of collective goals (i.e., the attainment or maintenance of states of interaction between the system and its environment that are relatively desirable from the point of view of the system). The maintenance of security against the adverse use of force is a critical collective goal for most communities. Considerations such as these underlie the general tendency of the overall collectivity to develop an effective monopoly of the internal organization of force through a recognized system of law.

Because of the problems involved in the use and control of force, the political organization within a community must always be integrated with the legal system, which is concerned with administering the highest order of norms regulating the behavior of its individuals. No community can afford to permit any other normative order to take precedence over

that sanction by that community's politically organized society. Indeed, the promulgation of any such alternative order is a revolutionary act, and the agencies responsible for it must assume the responsibility of political organization. In fact, it has even been suggested by Talcott Parsons (1964) that the focus of the intricate subsystem is the legal system. The establishment of a norm is not alone functionally adequate. The processes necessary for the interpretation, the determination of jurisdictional problems and problems of sanctions or enforcement must be created. The paramount judicial function in a community is interpretation, of which the other two functions are mere subcategories.

The danger inherent in a system of norms in a community is that it will become either too rigid or so flexible that an adequate definition of a situation is rendered impossible or functionally inappropriate. This danger is particularly visible at the higher levels of the system, through legislative, judicial, and administrative rulings and decisions, and at lower and private collectivities through functionally cognate mechanisms.

An important point of a system of norms is its internal consistency. This should be a prime focus of the function of interpretation and, in highly differentiated systems, is primarily a judicial function, though sometimes codes are prepared and legislatively enacted. Of secondary importance, the specification of the application of higher-ordered norms to levels where they can guide the action of the community's

lower level structural units by defining situations for them must be considered. Another major functional problem of a normative system concerns the adjustments occurring because the communitization process is always involved in interchange with the changing environment. These naturally have repercussions on individuals' interrelationships, whose significance for the system is focused in the bearing of these relations on the content of the system of norms, and on the degrees and motivation of conformity with the norms.

There are definite situations within the academic community and its subcommunities where man's departure from his existing level of obedience to a particular community norm brings about changes in the other elements of the social system such as his behavior tends to return to its initial level; and there are other situations where a departure from his existing degree of obedience to a norm does not produce a return but a further deviance or departure. We can observe this without making any assumptions about the amount of an individual's satisfaction. Homans called this first situation, the one in which control is effective, a state of equilibrium. I would therefore suggest that this complex relationship, between the legal system and the community, is much stronger when the community is in a state of equilibrium.

This state of equilibrium could be compared to Chester I. Barnard's "zone of indifference", because both the state of equilibrium and the "zone of indifference" support the existence of a structure of law in

the same manner. Barnard said, "If all orders for action reasonably practicable were arranged in the order of their acceptability to the person affected, it may be conceived that there are a number which are clearly unacceptable, that is, which certainly will not be obeyed; there is another group somewhat more or less on the neutral line, that is either barely acceptable or barely unacceptable; and a third group unquestionably acceptable. This last group of regulations or laws lies within the 'zone of indifference'. The person affected will accept orders lying within this zone and is relatively indifferent as to what the order is so far as the question of authority is concerned." The "zone of indifference" will be wider or narrower depending upon the degree to which the inducements exceed the burdens and sacrifices which determine an individual's adhesion to the organization. Within this "zone of indifference" the role of the legal system could appear to be solidifying the community. Since the legal system is dependent upon the acceptance of norms by the general public of the community, it should be possible to take advantage of this "zone of indifference" to induce acceptance of normative standards within the community. If, in turn, these norms are accepted and become conceptualized, the set of norms held in common would have increased, thus expanding the basis for solidarity of the community.

This sense of association for the common pursuit of mutual goals is, in turn, the basis for the legal system. The degree of difference the associational views take is critical. Only by this common interest

are all the continuing members of the community bound to the permanent nature and purposes of the association in a way somehow more decisive and more consistent with present-day reality. We are dealing here with subtle and nearly imponderable matters, matters of emphasis, so neither pure clarity nor the certainty of demonstration should be expected. But these matters do color the whole outlook and therefore affect everything that comes after, everything about a picture of a community in academia. What is being described, in part created, is a life style for an organic entity of many members, each of which must have its function. The communities that exist within a university are no simple anarchic commune, created from nothing by the deeds of its current active members. Nor is it simply a trust or a property of the general public of such institutions. It is an association, "sui generis". Membership in it is an associational membership, a membership of adhesion rather than a relationship simply of contact or of membership in a purely self-constituted, self-created organization. From this obligation flows the communitization process in academia. And from this obligation grows the system of law that will be supported by the community.

In summary, it seems to me that the system of law within a community helps meet Ardrey's triad of needs (identity, stimulation, and security). The legal system provides a framework on which interaction can take place within the community. Parsons uses an example of a two-player chess game to illustrate such interactions:

"The meaningfulness of the goals and the stability of the generalized patterns of facilities depend on the existence of a well-defined set of rules, which forms the center of the integration of the system. The roles, in this case, are not differentiated on a permanent basis; rather, the rules define the consequences of any given move by one player for the situation in which the other must make his next choice. Without such rules the interaction process could not be stable, and the system of adaptive facilities would break down; neither player would know what was expected of him or what the consequence of a given set of moves would be."

Therefore, it is easy to see that the legal system provides a basic stability in which the individual can operate within the community and only when the system of law is just and effective is the community that supports it able to function. It is truly a fact that the support of the legal system rests on the consent of those governed or affected by it. For it is not the law or the legal systems that create communities but the community that creates the legal system out of the interaction that results between the individuals who are a part of the community.

The system of law then must work very hard to define or delineate its jurisdiction or authority within the community structure. For history has indicated to us that a system of law within the academic community does not have much lasting effect on the violator but does tend to reaffirm the norm established by the community and serve

as a vehicle for reexamination of the social order. Unfortunately, many deans within the community structure of an institution of higher education tend to spend more of their time trying to justify the effect of the system on the lawbreaker instead of understanding its results and more general effects on the community within which it is operating.

In the 1970's, a time for change, many student personnel administrators are going to find it difficult to fix defective community systems unless they understand the legal systems which these structures are creating. In fact, I predict that more student personnel administrators will begin to understand that the focus of the intricate subsystem or subcommunity within their institution is a legal system and the norms it supports. We must learn that the establishment of a norm is not alone functionally adequate. The communitization process must also establish the necessary procedure for interpretation, determination and enforcement of the norms established by the community.

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